

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DOROTHY DAVENPORT**  
Claimant

VS.

**DAY & ZIMMERMAN, INC.**  
Respondent

AND

**LIBERTY MUTUAL INSURANCE**  
Insurance Carrier

Docket No. 168,279

## ORDER

**ON** the 31st day of March, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award and Nunc Pro Tunc Order entered by Administrative Law Judge Shannon S. Krysl dated February 18, 1994, and February 23, 1994, came on for oral argument by telephone conference.

## APPEARANCES

The claimant appeared by and through her attorney, Timothy A. Short, of Pittsburg, Kansas. The respondent and insurance carrier appeared by and through their attorney, Richard C. Dearth, of Parsons, Kansas. There were no other appearances.

# RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

## STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law

Judge are herein adopted by the Appeals Board.

### **ISSUES**

- (1) What is the nature and extent of claimant's injury and disability?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein the Appeals Board makes the following findings of facts and conclusions of law:

- (1) Claimant has suffered a seven and one-half percent (7½%) permanent partial impairment to the body as a whole on a functional basis as a result of her injury suffered while employed with the respondent.

Claimant, a 58-year old high school graduate, started working for the respondent in 1984 as a bomb builder. On November 6, 1991, claimant stubbed her toe, tripped and fell landing on her ribs, left shoulder and left leg. Claimant suffered an immediate onset of pain and was taken by ambulance to the hospital. By claimant's own admission, the shoulder and the leg both healed adequately and claimant suffered no permanency as a result of those injuries. Claimant continued to experience pain in her rib cage on the left side with the pain occurring on a daily basis.

Subsequent to the fall, claimant was referred to Dr. Farley and Dr. Hulsman, who examined her ribs, took x-rays and bandaged the damaged ribs. She was later referred to Dr. Paul W. Toma for evaluation and treatment. Dr. Toma examined claimant's x-rays which he described as being normal. He requested a bone scan which evidenced the fractured ribs on the left side of claimant's body in the area where claimant was experiencing pain. Claimant returned to light duty work for the respondent in January of 1992, and continued working for the respondent until she was voluntarily laid off in September of 1992. Dr. Toma, after examining claimant on two occasions, could provide no explanation for claimant's ongoing symptoms of pain. He opined the symptoms suffered by claimant could not have come from the fractured ribs or from any cartilage or muscle damage in that area as the push test and the deep breath test administered by Dr. Toma caused no pain to the claimant. Dr. Toma also opined that the American Medical Association's Guides to the Evaluation of Permanent Impairment, provided no instruction or justification for assessing an impairment based upon the findings elicited from the claimant's examination. Dr. Toma also opined that the fracture suffered by claimant should not cause pain one to two years later.

Claimant was examined by Dr. Edward J. Prostic, M.D., a board certified orthopedic surgeon, on September 4, 1992, at the request of claimant's attorney. Dr. Prostic opined that claimant's pain complaints may be related to either muscle or cartilage damage resulting from the fall and fracture. He felt this led to a permanent injury to the claimant and assessed her a seven and one-half percent (7½%) permanent partial impairment to the body as a whole on a functional basis. Neither doctor anticipated the need for additional medical treatment for this condition.

Dr. Prostic testified that most likely the claimant's intercostal muscle suffered a tear at the time of the injury. Dr. Toma disagreed with this diagnosis, but could provide no explanation for claimant's ongoing complaints of pain.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785-786, 817 P.2d 212 (1991).

The uncontradicted evidence in this case is that the claimant suffered an injury on November 6, 1991, resulting in one or two fractured ribs and continued pain in the area of the rib fracture. While the medical evidence is contradictory in that Dr. Toma disputes whether claimant's pain complaints stem from this rib fracture or from any soft tissue injury connected with the rib fracture, he can provide no medical explanation for claimant's ongoing complaints of pain. Dr. Prostic opined claimant's condition more probably than not was due to muscle or cartilage damage suffered at the time of the fall. He felt the injury was most likely in the claimant's intercostal muscle or the cartilage connected to the ribs. He further opined that since this is a soft tissue injury there is no way to verify by objective medical testing and was forced to rely upon the results of the claimant's physical examination to reach his diagnosis.

Both medical examiners agree that the American Medical Association's Guides to the Evaluation of Permanent Impairment provides no basis for an impairment rating and, while Dr. Toma refused, absent direction from the AMA guide, to assess claimant a functional impairment, Dr. Prostic, based upon his past experience, assessed claimant a seven and one-half percent (7½%) whole body impairment of function stemming from this injury.

The Appeals Board finds that claimant has met her burden of proving a permanent impairment of function stemming from the injury of November 6, 1991, and further finds that Dr. Prostic's evaluation of the claimant's condition is more accurate and credible in the assessment of claimant's functional impairment.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated February 18, 1994, and the Nunc Pro Tunc Order of Administrative Law Judge Shannon S. Krysl dated February 24, 1994, are affirmed in all respects and that the claimant, Dorothy Davenport, shall be and

is granted an award against the respondent, Day & Zimmerman, Inc., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury on November 6, 1991.

Claimant is awarded 8.57 weeks of temporary total disability compensation at the rate of \$289.00 per week in the sum of \$2,476.73 followed by 406.43 weeks of permanent partial compensation at the rate of \$22.02 per week or \$8,949.59 for a seven and one-half percent (7½%) permanent partial general disability to the body as a whole on a functional basis, making a total award of \$11,426.32.

As of February 16, 1994, there would be due and owing to the claimant 8.57 weeks of temporary total disability compensation at the rate of \$289.00 per week in the sum of \$2,476.73 plus 110.43 weeks of permanent partial disability compensation at the rate of \$22.02 per week in the sum of \$2,431.67 for a total due and owing of \$4,908.40 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$6,517.92 shall be paid at the rate of \$22.02 per week for 296 weeks or until further order of the Director.

The Appeals Board further finds claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement.

The Appeals Board further finds that future medical benefits will be awarded only upon proper application to and approval by the Director of Workers Compensation.

The claimant's attorney's fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid direct as follows:

SHAUN J. HIGGINS, RPR-CM Deposition of Dorothy Davenport	Unknown
HOSTETLER & ASSOCIATES, INC. Deposition of Edward J. Prostic, M.D.	\$ 91.95
FREEMAN & ASSOCIATES Deposition of Dr. Paul W. Toma	\$ 112.70

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Timothy A. Short, PO Box 1449, Pittsburg, Kansas 66762  
Richard C. Dearth, 1712 Broadway, Parson, Kansas 67357  
Shannon S. Krysl, Administrative Law Judge  
George Gomez, Director